MGM Grand Hotel, Inc. ***and*** **Bruce Esgar, Petitioner and Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165, affiliated with Hotel Employees and Restaurant Employees International Union, AFL–CIO.** Cases 28–RD–776, 28–RD–785, and 28–RD–786[1]

September 30, 1999

DECISION ON REVIEW AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, BRAME, AND HURTGEN

By letter dated June 17, 1997, and Decision and Orders dated October 27 and December 3, 1997, the Regional Director for Region 28 dismissed the Petitioner's decertification petitions in the above-captioned proceedings finding that the Employer's voluntary recognition barred the petitions because a reasonable time to bargain had not elapsed at the time the petitions were filed.[2] The Petitioner filed timely requests for review of the Regional Director's dismissals. The Board has carefully reviewed the record and the Petitioner's requests for review. The Board grants the Petitioner's requests for review and, on review, affirms the Regional Director's conclusion that a reasonable time to bargain had not elapsed and the petitions should be dismissed as barred by the Employer's voluntary recognition of the Union.

Facts

Background: The Employer is one of the largest employers in the Las Vegas area. Its operations include a 5005-room hotel, several restaurants, casino areas, and other attractions. On November 15, 1996, pursuant to a card check, the Employer voluntarily recognized the Union as the exclusive collective-bargaining representative of its employees.[3] At that time, there were approximately 2900 employees. This number increased to approximately 3100 employees in at least 53 separate classifications by October 1997. Although the Employer has been in existence for some time and had a number of established employment policies at the time it recognized the Union, the Employer had never bargained with a union for a collective-bargaining agreement.[4]

The Negotiation Process: Although the Union has negotiated contracts with many other Las Vegas employers, the Union rarely drafts such agreements "from scratch" but instead uses an existing agreement as a model for its negotiations. From the outset, however, the Union and the Employer agreed to structure their bargaining and ultimately their agreement, in a different manner and draft their initial contract from the ground up. Instead of using a traditional "hierarchical" approach to bargaining where representatives of the Employer and the Union meet and negotiate the contract, the Union assisted in forming a number of committees, subcommittees, and task forces composed of both union representatives and employees to study each aspect of the contract, evaluate employee satisfaction with existing practices, and draft and evaluate proposals.[5] Small groups of employees and union representatives also met to set the agenda for the employee meetings and narrow the topics for discussion in the employee meetings. Finally, the Employer and union representatives met periodically to track the progress of the negotiations and pinpoint potential problems.

The goal of the negotiation process between the Employer and the Union was to put in place a "living contract" that would provide for a problem-solving mechanism by which the parties could discuss and resolve problems and issues arising during the term of the contract that are not specifically addressed or contemplated by the contract. This way, the contract would provide the parties with flexibility to solve problems during the contractual term. The Union enlisted the aid of consultants from the San Francisco area in designing the living contract concept and drafting those portions of the contract. As a number of hotel-casinos of similar size to the Employer had recently opened in the Las Vegas area, the parties contemplated that their efforts and the innovative MGM contract would serve as a leading example that could be a model for these hotels and casinos in the Las Vegas area in their collective bargaining.[6]

[1] The Petitioner's motion to consolidate the captioned cases is granted.

[2] Case 28–RD–776 (Petition I) was filed on April 17, 1997; Case 28–RD–785 (Petition II) was filed on September 16, 1997; and Case 28–RD–786 (Petition III) was filed on November 6, 1997.

[3] The Petitioner, in his requests for review, takes issue with the manner in which the Union obtained its initial showing of interest. Our dissenting colleague, Member Brame, also casts doubt on the card check. However, two unfair labor practice charges filed over the lawfulness of the Employer's voluntary recognition of the Union were investigated and considered and deemed to be without merit by Region 28. The Charging Parties' appeals of those determinations were subsequently denied by the General Counsel. Accordingly, we find Member Brame's suggestion that the card check was "suspicious" and therefore invalid to be without basis. Further, there is absolutely nothing in the record indicating that the Union's organizing campaign was "unsuccessful" as characterized in Member Brame's dissenting opinion. Indeed, at the time the Employer commenced bargaining with the Union, the Union had obtained signed authorization cards from a majority of employees in the unit.

[4] The Employer has been open since December 1993, and when it recognized the Union the Employer had its own wage, benefit, insurance, and pension structure. The Employer's recognition of the Union followed years of picketing and demonstration by the Union and various employee supporters.

[5] For instance, a task force was established to resolve grievance/arbitration procedures. Another task force studied transfers, promotions, seniority, and training. Yet another task force was assigned to issues in the housekeeping department. During the course of these negotiations, these task forces both evaluated existing employment terms and negotiated new terms. Subcommittee minutes entered into the record indicate that numerous proposals and counterproposals were submitted and evaluated by the workweek, schedules, and layoffs subcommittee, as well as by the flextime subcommittee.

[6] The Union is the collective-bargaining representative at approximately 35–40 hotel-casinos in Las Vegas. Historically, the Union

The Initial Bargaining Sessions Prior to Petition I: Petition I was filed on April 17, 1997, 5 months after the Employer's recognition of the Union. Approximately 1 week after recognition, a committee of 70 employees met in prenegotiation meetings to discuss the negotiation process. In December 1996 and January 1997, the Union and approximately 90 employee volunteers canvassed the unit to discern the employees' preferences as to what the contract should contain. The Union also commissioned an outside firm to conduct a formal poll of the unit employees' preferences. On January 27 and 29, 1997, the employee committees met to draft contract proposals for their departments as well as overall proposals, and the Union formed several employee subcommittees to work on bargaining proposals.

The parties' first main negotiating session was scheduled for February 21, 1997, among the union negotiators and officers, approximately 40 employees, and representatives of the Employer. However, this meeting was postponed because the Employer's main negotiator had taken ill. The first main bargaining session took place on March 3, 1997, and was subsequently followed by four other similar "main" bargaining sessions, including two 2-day sessions at which the Employer and the Union presented and bargained over extensive proposals and counterproposals, and set up joint task forces to examine specific issues. During these sessions, the parties agreed on, inter alia, the preamble, labor-management cooperation language, a portion of the recognition clause, political contribution deductions, union representatives and communications, and dues checkoff. The parties also discussed subcontracting, contract duration, gratuity policies, the status of information requests, and the status of the task force subcommittee discussion; they agreed in principle to successorship contract negotiation issues and expediting future negotiations. In addition to the "main" bargaining sessions, the parties engaged in five joint task force committee meetings. Within 2–1/2 weeks of the filing of Petition I, the Employer and the Union held two additional main sessions to discuss subcontracting, benefits, wages, and a guaranteed workweek.

Bargaining Sessions between Petition I and Petition II: Between the dismissal of Petition I on June 17, 1997, and the filing of Petition II on September 16, 1997, the Employer and the Union engaged in approximately 10 additional bargaining sessions, meetings between both parties' chief negotiators, and over 20 task force meetings. The parties also initiated a series of "small group" meetings to expedite bargaining. The parties reached agreement on contract language concerning: a recognition clause; a successorship clause; flextime provisions governing vacation, holiday, personal and sick leave; leaves of absence; jury duty; transfers/promotions/seniority; management rights; discipline; gratuities/paychecks; meals and breaks; uniforms; savings clause; confidentiality and disclosure; training; nondiscrimination; past practices; and dispute resolution (grievance-arbitration).

Within 2 weeks of the filing of Petition II on September 16, 1997, the parties met for another negotiating session in which they agreed on a goal of completing negotiations by October 15, 1997. However, the parties also agreed that if they did not reach a final agreement by this date they would continue to negotiate. By Decision and Order, the Regional Director dismissed Petition II on October 27, 1997.

Bargaining Following Petition II: Between October 3 and November 8, 1997, the parties met for 10 additional main negotiating sessions, including small and large group sessions and a meeting between the Employer's and the Union's principals. The parties also conducted several task force meetings during this period. By October 24, 1997, the parties had agreed upon the terms incorporating the concept of the "living contract." On November 5, 1997, the parties also finalized agreement on transfers, promotions, seniority, dispute resolution (arbitration), successorship, gratuities, wages, and paychecks. Several issues, however, remained to be resolved. Some of these issues were on the verge of resolution, while others were ongoing, such as future operations, employment procedures (recruitment, referrals, dispatch), and workweek scheduling.

Petition III was filed November 6, 1997. On the same day, the parties held two additional small group meetings. In addition, the parties held a bell department task force meeting on November 7, which finalized agreement on issues related to tips and gratuities within that department. Also on November 7, the parties' respective principals met at the Employer's facility. On November 8, 2 days after the filing of Petition III, the parties reached a final agreement on retirement benefits, medical benefits, a child care center, management rights, and no-strike/no-lockout provisions. It was also on this date that the parties completed their negotiations on a tentative contract. On November 13, 1997, the Union held informational sessions and ratification meetings. At those meetings, the employees ratified the contract by a vote of 740 to 103. On that same date, the parties formally executed the contract.

Analysis

As a means of achieving industrial peace, the Board seeks to balance the competing goals of effectuating employee free choice while promoting voluntary recognition and protecting the stability of collective-bargaining

selects one or more Las Vegas hotel-casino employers as being representative of the other employers with which to negotiate an agreement that would serve as a model for the successor agreements with those other employers. It is difficult to compare the instant negotiations with others in the industry, as few involve the drafting of an initial contract from the ground up, as here. The record reflects one instance involving the Santa Fe Hotel in which the parties have engaged in ongoing negotiations for an initial contract over the course of years.

relationships. *Ford Center for the Performing Arts*, 328 NLRB 1, slip op. at 1 (1999), citing *Smith's Food & Drug Centers,* 320 NLRB 844, 846 (1996). It is a long-established Board policy to promote voluntary recognition and bargaining between employers and labor organizations, as a means of promoting harmony and stability of labor-management relations. See, e.g., *Smith's Food & Drug Centers*, supra at 846*; NLRB v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978) (noting that "[v]oluntary recognition is a favored element of national labor policy"). The Board encourages voluntary recognition and bargaining by permitting the parties "a reasonable time to bargain and to execute the contracts resulting from such bargaining." *Keller Plastics Eastern, Inc.*, 157 NLRB 583, 587 (1966). Thus, when an employer voluntarily recognizes a union, based on a demonstration of majority support,[7] the parties are entitled to rely on "'the continuing representative status of the lawfully recognized union for a reasonable period of time' even though, in fact, the union may have lost its majority in the unit." *Blue Valley Machine & Mfg. Co.,* 180 NLRB 298, 304 (1969), quoting *Keller Plastics*, supra at 587.

This presumption of continuing majority status is not based on an absolute certainty that the union's majority status will not erode. Rather, it is a policy judgment which seeks to ensure that the bargaining representative chosen by a majority of employees has the opportunity to engage in bargaining to obtain a contract on the employees' behalf without interruption. The ability to select a bargaining representative would otherwise be meaningless. At a minimum, then, this presumption allows a labor organization freely chosen by employees to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support and be decertified. See *Ray Brooks v. NLRB*, 348 U.S. 96, 101 (1954). This presumption also removes from the employer the temptation to delay the bargaining process in the hope that such a delay will undermine the majority support of the union. See *Keller Plastics*, supra at 587.

What constitutes a '"reasonable time' is not measured by the number of days or months spent in bargaining, but by what transpired and what was accomplished in the bargaining sessions." *Ford Center for the Performing Arts,* supra, slip op. at 1, citing *Royal Coach Lines*, 282 NLRB 1037, 1038 (1987). In determining whether a reasonable time has passed, the Board examines the factual circumstances unique to the parties' recognition and bargaining to determine whether, under the circumstances, the parties have had sufficient time to reach agreement. In so doing, the Board looks to the degree of progress made in negotiations, whether or not the parties were at an impasse, and whether the parties were negotiating for an initial contract. See *Ford Center for the Performing Arts*, supra, slip op. at 1; *N. J. MacDonald & Sons, Inc*., 155 NLRB 67, 71–72 (1965). By this policy, the Board seeks to enable newly established bargaining relationships to become productive and harmonious.

Particularly, where the parties are negotiating an initial contract, the Board recognizes the attendant problems of establishing initial procedures, rights, wage scales, and benefits in determining whether a reasonable time has elapsed. *Ford Center for the Performing Arts*, supra, slip op. at 1; *N. J. MacDonald & Sons, Inc.,* supra at 71–72. The Board also recognizes that establishing such initial procedures and contract terms may take time that is not required in those instances where "a bargaining relationship has been established over a period of years and one or more contracts have been previously executed." *N. J. MacDonald & Sons,* supra at 72. The Board has also expressed its reluctance to negate good-faith bargaining for an initial contract when the parties' efforts are on the verge of reaching finality. *Ford Center for the Performing Arts*, supra, slip op. at 2.

In the instant case, we agree with the Regional Director that a reasonable time to bargain had not yet passed by the time each of the three petitions was filed. As an initial matter, the contract the parties set out to establish was unique in many respects. The Employer is among the largest hotels in the world and its operations are among the largest on the Las Vegas strip. The unit itself is also very large, exceeding 3000 employees in 53 classifications. Although the Employer had been in existence for some time, and had a number of employment policies already in place, it had never bargained with a union before. Similarly, while the Union had contracts with many other Las Vegas employers, it had never before bargained for an initial contract with one of the Employer's size.

In their negotiations, the parties departed from the general practice of adopting and modifying a contract that was already in existence. Instead, they set out to create a novel agreement that could be used as a model by other area employers in the future. Both the agreement and the process used to achieve it were innovative. To encourage broad employee participation in the bargaining process, the parties created a structured framework of committees and subcommittees. Once in place, these committees surveyed employee desires, brought participating employees "up to speed" on difficult contract issues, evaluated the Employer's existing practices, formulated and evaluated contract proposals, and worked with union representatives in drafting contract language. These committees met regularly and frequently, and consistently made progress in their efforts. Midway through negotiations, the parties incorporated small group meet-

[7] It has been the Board's longstanding policy that employees are not limited only to a Board election in the selection of their bargaining representative. See *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

ings into their negotiations to streamline the process and set the agenda for the employee meetings. Significantly, groups of employees, with union support and assistance from outside polling companies and consultants, evaluated each of the existing terms of employment in the process of structuring contract proposals, and thereafter, arrived at mutually agreeable contract terms through the negotiation process. The very description of this bargaining process shows just how complex and time-consuming it was, as even the parties recognized when they began incorporating small group meetings into the negotiations in an attempt to move the process along.

Our dissenting colleague, Member Brame, discounts the difficulties of the bargaining process because some of the final contractual provisions are similar to those in place prior to recognition or are modifications of existing terms. His argument ignores the simple realities of bargaining. The mere fact that the parties ultimately may settle on existing terms by no means rules out their consideration of alternatives in difficult and lengthy negotiations before reaching agreement. Indeed, the record indicates just that. Provisions, such as those relating to wages and pension benefits, were considered, discussed, and modified to provide greater flexibility in future negotiations.[8] Significantly, the contract broke new ground with its "living contract" provisions and a commitment to study the feasibility of child care,[9] provisions that had never before been included in other hotel-casino contracts in Las Vegas.

In sum, upon recognition, the parties developed an elaborate working framework which resulted in fruitful and effective bargaining. At all relevant times prior to the filing of each of the three petitions, it is clear that the parties were diligent in their efforts to reach agreement, never reached impasse, and consistently expressed their desire to complete the negotiations and execute a contract. In particular, at the time Petition III was filed,[10] the parties had made substantial progress toward reaching agreement, had few remaining issues to resolve, and worked steadily to finalize their agreement, which they achieved only days after the petition was filed. Indeed, the parties had reiterated their commitment to finalize their negotiations just a few weeks prior to Petition III's filing. The record reflects the parties' steady efforts to achieve closure to their bargaining; not only did the parties continue to meet frequently, they had reached agreement on the *vast majority* of the contractual provisions prior to Petition III. The fact that the process took over 11 months to complete, or that there remained a few issues when Petition III was filed, does not, and should not, form the basis for thwarting the extensive good-faith efforts of these parties. To further the Act's policy of favoring "sound and stable" labor-management relations, it is incumbent upon the Board to recognize and encourage the efforts expended by both the Employer and the Union in attempting innovative bargaining structures and processes and novel contractual provisions. To deny the protection of the voluntary recognition bar in this case would frustrate such creative efforts by forcing the parties to endure the disruption of a decertification election just when their efforts are on the verge of reaching fruition.

Under the unique circumstances presented here, we find that, in balancing the competing goals of effectuating free choice while promoting voluntary recognition and protecting the stability of collective-bargaining relationships, the purposes of the Act are best served by a finding that a reasonable time had not elapsed at the time the instant petitions were filed. In reaching this conclusion, we recognize our dissenting colleagues' concern for protecting the employees' Section 7 right to choose their bargaining representative. We take seriously the Act's command to respect the free choice of employees as well as to promote stability in bargaining relationships. These two statutory goals often require careful balancing by the Board. See *St. Elizabeth Manor, Inc.*, 329 NLRB No. 36, slip op. at 5 (1999). In the instant case, we believe that such a balance has been achieved. We note that the employees are not forever foreclosed from changing or eliminating their bargaining representative at the appropriate time, i.e., during the window period prior to the expiration of the collective-bargaining agreement. The voluntary recognition bar extends for a reasonable period, not in perpetuity.[11]

---

[8] For instance, while the wage structure remained substantially the same as that in place prior to recognition, the parties, through the negotiation process, solicited a pledge from the Employer to "meet or beat" the wages at other Las Vegas resorts, and the contract provides a provision to reopen negotiations to carry out this pledge. The parties further agreed to have this "meet or beat" commitment subject to binding arbitration. Similarly, the parties did not merely adopt the Employer's existing pension benefits. Rather, through negotiation, the parties drafted a provision that would allow the employees to choose between the Employer's plan or the Union's pension plan. Arriving at this agreement required the parties to negotiate over such details as effective dates of the election, the Employer's contribution to the funds, vesting dates of each fund, length of service bonus contributions, and service credit for employees who opt to contribute to the union plan.

[9] The parties negotiated over the feasibility of the Employer's opening an on-site child care center. While no specific provisions were placed in the contract, the agreement in itself is significant as no other Las Vegas resort contains such a facility. Over the course of negotiations, the Union formed a committee, which the Employer has promised to work with in investigating the issues involved in constructing and maintaining such a facility. Their agreement on the child care issue was hardly "unripened" as labeled by Member Brame, but rather was reflective of the problem-solving approach in their living contract.

[10] Our dissenting colleagues agree that a reasonable time for bargaining had not elapsed at the time Petitions I and II were filed and take issue only with Petition III.

[11] We further note that shortly after Petition III was filed the employees were given an opportunity to express their opinion through a ratification vote. The employees approved the contract by a margin of 7 to 1.

The fact that, as the Petitioner alleges, the number of votes in the ratification is exceeded by the number of decertification signatures, is

ORDER

The Regional Director's dismissals of the instant petitions are affirmed.

MEMBER HURTGEN, dissenting.

I would grant review and process the petition in Case 28–RD–786.

The Employer voluntarily recognized the Union on November 15, 1996, and bargaining commenced. On April 17 and September 10, 1997, decertification petitions were filed. The Regional Director concluded that a reasonable time for bargaining had not elapsed, and he therefore dismissed these petitions. On November 6, 1997, a third decertification petition was filed. The Regional Director concluded that a reasonable time had still not elapsed, and he dismissed this third petition. My colleagues deny review. I would grant review and reverse as to the third petition.

This case, and others like it, require a balance between (1) giving the employer and union a reasonable opportunity to reach a collective-bargaining agreement and (2) protecting the Section 7 rights of employees to reject or retain the union as their representative. While the first factor represents a policy choice, the latter one is expressly in the Act, and indeed lies at the heart of the Act. Thus, while I agree that balancing is required, and I am sensitive to both factors, the Act compels me to be especially sensitive to the second factor.

The employees involved here have tried three times to get an election. The door has been slammed shut on all three occasions. Further, on November 13, 1997, after the third petition was filed, a contract was reached, expiring on November 12, 2000. Thus, the dismissal of the petition effectively closes the Section 7 door for 3 years.

The evidence shows that, as of November 6, the parties remained apart on wages, no-strike/no-lockout, health and welfare, pension, and subcontracting. Admittedly, the parties were close to agreement on these issues, but the fact remains that they had not yet reached agreement. More importantly, the parties were also apart on: extension of contract to other operations; employment procedures; and workweek scheduling.

In sum, more than 11 months after recognition, the parties were still apart on many important issues. Concededly, there was a reasonable chance, as of November 6, that these issues would be resolved. Certainly, with the benefit of hindsight, we now know that an agreement was reached on November 13. However, the issue is not whether, as of November 6, there was a reasonable prospect for agreement. Rather, the issue is whether the parties, as of November 6, had already been given a reasonable time in which to succeed. As discussed above, that question must take into account the Section 7 right of the employees to reject or retain the Union as their representative.

In a case involving a Board certification, the insulated period is 12 months. That is, where the employees have registered their choice in the context of the solemnity of a Board election, their Section 7 right to "change their minds" is effectively foreclosed for 12 months. By contrast, in a case involving only voluntary recognition, the period is only "a reasonable period of time." There is no representation case where that time has been extended, as here, to a period that is just 9 days short of 12 months. I would not so extend it here.

I would conclude that a period of almost 12 months is not an unreasonably brief period, at least as compared to the importance of the Section 7 rights involved here. Thus, I would give these employees, who have been twice foreclosed from exercising these rights, an opportunity to now exercise those rights.[1]

My colleagues say that "what constitutes a reasonable time is not measured by the number of days or months spent in bargaining." I find it strange that the concept of "reasonable time" would not take into account, inter alia, the factor of time. Concededly, there are also other factors that are relevant, i.e., what transpired during the bargaining. However, that is not to say that "time" is irrelevant. Indeed, because the Section 7 right to reject a union is foreclosed during the period, the length of that period is important.

My colleagues point to the facts that: this was a first contract: it covers many employees; and it may set a pattern. As to the first point, I note that the Union has experience in negotiating with other casino hotels in the area, and the Employer also knows this area industry well. As to the second point, although the Employer's hotel is among the largest on the Las Vegas Strip, my colleagues do not claim that it is the largest. That is,

not relevant as none of the parties allege that the employees were prevented in any way from placing votes for or against ratification of the contract. Indeed, the Union held information meetings on the contracts and provided opportunities for all unit employees, regardless of union membership, to vote on the contract. While Member Brame's dissent argues that employees wishing to vote on the ratification of the contract may have been prevented from doing so by inconvenient scheduling and "security concerns," the correspondence between the parties in the record indicates otherwise. In addition to the time slots normally reserved for employee meetings, which the Union noted are scheduled to ensure the largest employee participation, additional meeting times were scheduled throughout the day to accommodate the schedules of employees working on all shifts. In addition to its regular security force, the Union also hired uniformed police officers to be present throughout the meetings to reassure all employees that the balloting would be conducted in a safe and orderly manner.

Finally, neither Member Brame nor the Petitioner argues that an unrepresentative contingent of employees voted on ratification of the contract, or that the Union committed any specific acts that would prevent or discourage those employees opposing the execution of the contract from voting.

[1] *Ford Center for the Performing Arts*, 328 NLRB No. 1 (1999), is clearly distinguishable. In that case, the period was 9 months. Further, as of the time of the petition, the parties were on the verge of complete agreement. Finally, the petition was for only a small part of the unit in which bargaining was occurring.

there are other large hotels in this area, and the Union has negotiated contracts with them. As to the third point, the fact that this contract "may" set a pattern for other hotels is no reason to deny these employees a chance to exercise their Section 7 rights to decertify the Union.

The majority notes that the parties used innovative procedures in their bargaining, and that the parties dealt with difficult and novel bargaining issues. As to the procedures, I note that they were designed at least in part to "streamline the process." It is a bit ironic that such procedures are now relied on to explain the large amount of time for these negotiations. As to the assertedly difficult and novel issues, I simply note that a period of almost 1 year would not appear to be an unreasonably short period in which to reach agreement, particularly where, as here, the bargaining is in good faith. After all, the period for insulated bargaining is only 1 year after an election, irrespective of how difficult the bargaining issues may be. Finally, I note that the difficulty of bargaining is only a factor to be balanced against the importance of protecting the Section 7 rights of employees.[2]

Finally, my colleagues note that the "recognition bar" principle operates to prevent an employer from delaying the bargaining process in the hope that such a delay will undermine a union. Obviously, that principle has no relevance here. There is no assertion or claim that the Employer has been dilatory or otherwise bargained in bad faith. What is relevant here is that the Section 7 rights of employees are being foreclosed.

[2] I do not enter the debate (between the majority and Member Brame) as to the number of employees who voted for contract ratification on November 13, and the significance of that number. In my view, the critical fact is that on November 6 a requisite number of employees said that they desired an election.

MEMBER BRAME, dissenting.

Today, the majority denies over 60 percent of the employees in a 3100 employee bargaining unit access to a Board-supervised election, apparently favoring a highly suspicious card check conducted a year previous. I cannot join with the majority's holding, which will encourage employers and unions to manipulate our procedures in order to preclude employees from exercising their right to change or forgo union representation.[1] Thus, in the name of "industrial stability," today's majority has sacrificed employees' Section 7 rights to engage in self-organization or to refrain therefrom.

The specific issue presented is whether, as of November 6, 1997, the date on which the employee representative of MGM Grand Hotel filed this third decertification petition (Petition III),[2] a reasonable time for bargaining between the Employer and the Union had elapsed so as to justify dismissing their petition.[3] My colleagues find that a reasonable time for bargaining had not elapsed and affirm the Regional Director's refusal to process Petition III on that ground. I disagree. I would grant the Petitioner's request for review of the Regional Director's decision, reverse the Regional Director, reinstate Petition III, and remand for further proceedings consistent herewith.

I. FACTS

The controversy here stems from collective-bargaining negotiations between the Employer and the Union and employees' perceptions of those negotiations as expressed through the majority-supported Petition III.

The Employer, MGM Grand Hotel, operates one of the largest hotel-casinos in the world, which includes a 5005-room hotel, casino areas, several restaurants, and other attractions in Las Vegas. The Employer opened for business in December 1993. For nearly 3 years, the Employer operated nonunion. It developed novel employment terms and conditions that were, as the Union conceded, generally attractive to employees. As the Union also acknowledged, the Employer had established an employee culture that stressed teamwork and the importance of employees. Nonetheless, the Union, which has collective bargaining agreements with at least 35 other Las Vegas hotel-casinos, vigorously attempted to garner employees' support through an organizing drive.[4] The Union's organizing efforts were unsuccessful in that the Union did not petition the Board to conduct an election.[5] However, on May 31, 1996, the Employer signed a "Memorandum of Agreement" with the Union. This memorandum required the Employer to recognize the Union based on a valid card check, gave union organizers access to the Employer's property, and precluded the Employer from filing a petition for a Board-conducted representation election.[6]

[1] In *General Cable Corp*., 139 NLRB 1123, 1125 (1962), the Board stated that "[c]ontracts of definite duration for terms up to 3 years will bar an election for their entire period." See also *Appalachian Shale Products Co*., 121 NLRB 1160 (1958), in which the Board described the requirements a contract must meet if it is to serve as a valid contract bar.

[2] The Petitioner filed decertification petitions on April 17 (Petition I), September 10 (Petition II), and November 6, 1997 (Petition III). Another decertification petition, filed on July 22, 1997, was not processed. My colleagues affirm the Regional Director's dismissals of Petitions I, II, and III. I dissent only from my colleagues' decision to affirm the Regional Director's dismissal of Petition III. All references to Petition III refer to the decertification petition filed on November 6, 1997.

[3] The reasonable time for bargaining standard is described in sec. II of this opinion.

[4] The record shows that the Union's bargaining goal was to retain, and improve, where necessary, the Employer's established employment practices.

[5] Pursuant to Sec. 101.17 and 101.18 of the Board's Rules, the Board will not conduct a secret-ballot election unless a union's petition is accompanied by evidence of representation, which consists of signatures or cards or petitions indicating that at least 30 percent of the employees in the unit sought support the election request.

[6] The Union had previously entered into similar agreements with other Las Vegas hotel-casinos.

On November 15, 1996, the Employer voluntarily recognized the Union based on the results of a card check.[7] Following recognition, the remaining task–indeed the only task–for the Union and the Employer was to execute a collective-bargaining agreement within a reasonable time.[8] The chief negotiators for the Employer and the Union had many years of experience in negotiating collective-bargaining agreements in Las Vegas and had negotiated other collective-bargaining agreements with each other. The parties established a framework for bargaining that included subcommittees, committees, task forces, and main negotiating sessions; the parties also evaluated employee opinion about the goals of the bargaining process by using polls and surveys. The framework for bargaining, with the addition of small group meetings, was completed in the spring of 1997. Actual negotiations began on March 3, 1997, approximately 9 months after the neutrality agreement and 3 months after the Employer had voluntarily recognized the Union. The Union did not make its first contract proposal until April 8, 1997. Unhappy employees filed decertification petitions on April 17, July 22,[9] September 10, and November 6, 1997.

As of November 6, 1997, the Employer and the Union had not executed a collective-bargaining agreement. In fact, the Employer and the Union remained apart on provisions relating to retirement benefits, medical benefits, a child care center, management rights and responsibilities (subcontracting provisions), no-strike/no-lockout, work week scheduling, as well as issues relating to tips for complimentary banquet or room service functions and tips and gratuities within the bell department. The parties did not need to negotiate over the creation of initial medical and retirement benefits insofar as the Employer already had medical and retirement plans in place; instead, the parties negotiated over whether to give employees the choice of remaining with the Employer's plans or joining the Union's plans.

The parties reached agreement on the "living contract" provision on October 24, 1997. The three-paragraph "living contract" provision, contained in section 2.02 of article 2 (Labor-Management Cooperation), establishes a problem-solving mechanism through which the parties may raise mutually agreed-upon issues.[10] The "living contract" concept originated at the Employer's suggestion and was designed, initially, to address issues relating to housekeeping employees. It is the only employment procedure that was created outright–the Employer's other existing employment procedures were merely modified by the parties. The parties reached an "agreement" on wages on November 5, 1997. The wage agreement, however, simply continued the Employer's then current wage schedules and includes a limited contract re-opener through which the parties will, pending the outcome of the Union's negotiations with the preponderance of major Las Vegas Strip hotel-casinos, negotiate wage increases for the period July 14, 1998, through July 2000. If the parties do not agree, the matter of wages will be submitted to arbitration, but the arbitrator does not have the authority to determine a wage increase for any classification which exceeds the wage increases for the comparable classification negotiated by the Union with the preponderance of Las Vegas Strip hotel-casinos.

Although the Union and Employer had reached agreement on several other matters, a full agreement had not been reached when the Petitioner filed Petition III on November 6, 1997. However, on November 8, 1997, 2 days after the Petitioner filed Petition III,[11] the Employer announced to its employees in a newsletter that it had reached a tentative collective-bargaining agreement with the Union and that informational meetings at the MGM Grand and a ratification vote at union headquarters would soon follow. The tentative agreement was announced despite the fact that no genuine agreement had been reached relating to the construction of a child care

---

[7] The results of the card check revealed that only 52.6 percent of the eligible employees (1494 out of unit that then included 2840) signed authorization cards.

[8] See sec. II, infra.

[9] As noted, the petition filed on July 22, 1997, was not processed.

[10] Sec. 2.02, entitled "Problem Solving Teams," states the following (the agreement refers to unit employees as "cast members"):

> (a) The parties may establish Problem Solving Teams consisting of Cast Members (selected by the Union), Union representatives, and management representatives (selected by the Cast Relations Department) for a total Team composition of 8–10 members. Teams may be utilized only by mutual agreement. The parties agree to primarily make use of facilitators, translators and trainers who are available at no cost (e.g., FMCS, DOL or other similar services). If qualified facilitators, trainers and translators cannot be provided at no cost, the parties agree that the costs related to the Teams shall be shared evenly by the parties.
>
> (b) Cast Members shall be compensated at their regular straight time rate of pay for the time spent on Problem Solving Teams. A neutral professional facilitator may be used for the Teams until the parties mutually agree that the Team sessions will be conducted by group representatives.
>
> (c) Both the Union and the MGM Grand may raise mutually agreed upon issues through the Teams. The Teams cannot be used to supplant or replace the Dispute Resolution procedure and the Union retains all of its existing rights at its sole election to file grievances over alleged violations of the Agreement, either in lieu of or in addition to discussing the subject of a grievance through the Teams.

Sec. 2.01, entitled "Partnership," which is not part of the "living contract" concept, states, in part: "[b]oth parties agree to meet regularly, at the request of either party, to discuss problems, Cast Members suggestions, methods of improving morale, and other similar subjects."

[11] In between November 15, 1996, and November 13, 1997, employees' dissatisfaction with the bargaining process grew, as evidenced by the increasing level of employee support that accompanied each of the Petitioner's decertification petitions. Petition I was supported by approximately 1500 eligible employees. Over 1900 eligible employees, a majority of the 3100 unit employees, supported Petitions II and III.

center (the bargaining parties merely decided to study the issue) [12] and, as described above, wage increases.

On November 13, 2 days before the 1-year anniversary of the Employer's extending voluntary recognition to the Union, the Union held a ratification vote at the Union's headquarters. Before the actual vote, the Union's chief negotiator encouraged the attending employees to ratify the contract. Counsel for the Petitioner had expressed reservations about the scheduling of the ratification vote, and noted that several employees had security concerns about holding the vote at the Union's headquarters. Although the voting was open to all employees, fewer than one-third of the bargaining unit employees participated in the ratification vote, and the collective-bargaining agreement was approved by a vote of only 740 to 103. That same day, the Employer and the Union formally executed a collective-bargaining agreement, which expires on November 12, 2000. With the contract came the Board's contract bar, and with today's decision, the approximately 1900 employees who supported Petition III have lost any right to change their collective-bargaining representative for 3 additional years.

On December 3, the Regional Director dismissed Petition III on the ground that as of November 6 a "reasonable time" for bargaining had not elapsed. The Petitioner filed a timely request for review of the Regional Director's decision, which my colleagues deny today.

II. THE REASONABLE TIME FOR BARGAINING STANDARD

The Employer here voluntarily recognized the Union. An employer may voluntarily recognize a union as the unit employees' bargaining representative if done in good faith, and on the basis of a previously demonstrated majority.[13] Voluntary recognition is fundamentally different from a "solemn"[14] election conducted under "laboratory conditions."[15] A Board election and the Board certification that follows occupy a special place in Board law:

> There is no doubt but that an election . . . conducted secretly . . . after the employees have had the opportunity for thoughtful consideration, provides a more reliable basis for determining employee sentiment than an informal card designation procedure where group pressures may induce an otherwise recalcitrant employee to go along with his fellow workers.[16]

Thus, "secret elections are generally the most satisfactory–indeed the preferred–method of ascertaining whether a union has majority support."[17] Following a Board election and a subsequent certification, the Board applies its certification year rule. Absent unusual circumstances, the certification year rule both prohibits the employer from withdrawing recognition[18] and bars both employees and the employer from filing election petitions for a 1-year period, irrespective of loss of majority status.[19] "By thus substantially foreclosing any question of representation and clearly defining the duty of the employer during the 1-year certification period, the Board [achieves] the dual purpose of encouraging the execution of a collective bargaining contract and enhancing the stability of industrial relations."[20]

By contrast, where an employer voluntarily recognizes a union, Board practice forecloses withdrawals of recognition[21] and election petitions[22] for a "reasonable time" while the parties negotiate, rather than for a definite 1-year period.[23] After an employer has extended voluntary recognition to a union, "the parties must be afforded a reasonable time to bargain and to execute the contracts resulting from such bargaining. Such negotiations can succeed . . . and the policies of the Act can thereby be effectuated, only if the parties can normally rely on the continuing representative status of the lawfully recognized union for a reasonable period of time."[24] In applying this principle, "the Board seeks to balance the competing interests of effectuating employee free choice, while promoting voluntary recognition and protecting the stability of collective-bargaining relationships."[25]

Determining what constitutes a reasonable time for bargaining following an employer's lawful voluntary recognition of a union is not always a clear-cut task. The

[12] Art. 13, entitled "Child Care Center," states, in pertinent part: "[T]he Parties agree that within ninety days of the effective date of this Agreement they will form a labor-management committee to study the need for and the feasibility of establishing a child care center on the Employer's premises. The committee will include representatives of the Employer, Cast Members and labor organizations representing Cast Members."

[13] See, e.g., *Bus Systems*, 297 NLRB 169 (1989); *Josephine Furniture Co*., 172 NLRB 404 (1968); and *Sound Contractors Assn*., 162 NLRB 364, 365 (1966).

[14] *Ray Brooks v. NLRB*, 348 U.S. 96, 99 (1954).

[15] *General Shoe Corp*., 77 NLRB 124, 127 (1948).

[16] *NLRB v. Cayuga Crushed Stone,* 474 F.2d 1380, 1383 (2d Cir. 1973). The Board has expressed similar concerns about employer conducted polls. See, e.g., *Struksnes Construction Co.,* 165 NLRB 1062 (1967).

[17] *NLRB v. Gissel Packing Co*., 395 U.S. 575, 602 (1969).

[18] *Ray Brooks v. NLRB*, supra at 96, 98.

[19] *Centr-O-Cast & Engineering Co.,* 100 NLRB 1507, 1508 (1952).

[20] Id. at 1508.

[21] See, e.g., *Top Job Building Maintenance Co*., 304 NLRB 902 (1991); *Jerr-Dan Corp*., 237 NLRB 302 (1978).

[22] See, e.g., *Rockwell International Corp*., 220 NLRB 1262, 1263 (1975): "[f]ollowing a lawful grant of recognition the parties are entitled to a reasonable period of time to permit them to negotiate a collective-bargaining agreement; during that period a decertification petition is not timely."

[23] The reasonable time for bargaining standard also applies to bargaining following a Board order or a settlement agreement. See *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944) (Board order); *Poole Foundry & Machine Co*., 95 NLRB 34 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952) (settlement agreement).

[24] *Keller Plastics Eastern, Inc*., 157 NLRB 583, 587 (1966).

[25] *Ford Center for the Performing Arts*, 328 NLRB No. 1, slip op. at 1 (1999).

analysis is fact-intensive and depends on the particular circumstances of each case, for "[t]here are no rules concerning what constitutes a 'reasonable time' [and] each case must rest on its own particular facts."[26] Moreover, "the determination of whether a reasonable time has elapsed cannot be made prospectively, but can only be made after an examination of the bargaining history."[27] A reasonable time for bargaining "does not depend on either the passage of time or on the number of meetings between the parties, but instead on what transpired and what was accomplished during the meetings."[28] In determining whether there has been bargaining for a reasonable time, "[t]he Board considers the degree of progress made in negotiations, whether or not the parties are at impasse, and whether the parties are negotiating for an initial contract,"[29] mindful that "where the parties are negotiating for a first contract, the Board recognizes the attendant problems of establishing initial procedures, rights, wage scales and benefits."[30]

III. ANALYSIS

Today's case compels the Board to balance the competing goals of, first, protecting employees' Section 7 right to reject or retain a union as their collective-bargaining representative,[31] and, second, giving an employer and a union a reasonable opportunity to execute a collective-bargaining agreement. Employees' Section 7 rights comprise the core of the Act and, in applying the balancing process, the Board must show special sensitivity toward employees' rights. Sadly, my colleagues in the majority have abandoned employees' Section 7 rights in favor of "industrial stability,"[32] and, in the process, have enabled the Employer and the Union to deprive employees of their right to decide, in a secret-ballot election, whether to retain the Union as their collective-bargaining representative. Over 1900 employees out of a unit of 3100 employees have requested an election and retained counsel to support their third petition. After 356 days, the Employer and the Union had failed to reach an agreement. Undoubtedly aware that a reasonable time for bargaining cannot possibly extend past the 1-year period allowed certified unions, the Employer and the Union, faced with Petition III, quickened their bargaining pace, threw together a half-ripened agreement, and executed it just in time to allow the Regional Director to declare that the contract foreclosed these employees from Board processes for 3 more years.

My colleagues' conclusion that a reasonable time for bargaining had not elapsed by November 6, 1997, flows from their mistaken belief that the parties' election to utilize a complicated and groundbreaking bargaining process justified the unusually lengthy amount of time. Contrary to my colleagues, I believe that the facts of this case demonstrate that the bargaining need not be categorized as complex, unwieldy, or deserving of special treatment. To do otherwise allows the parties who executed the neutrality agreement and later the voluntary recognition to manipulate the bargaining process and deny over 1900 employees the one thing they want: a Board-conducted secret-ballot election.

In determining whether a reasonable time for bargaining had elapsed by the time Petition III was filed, I will consider the following factors traditionally used by the Board and their significance: first, whether the parties were negotiating for an initial contract; second, whether the parties reached an impasse; and finally, and most significantly, the degree of progress made in negotiations. As stated above, these factors are applied as part of the overall balancing of employees' Section 7 rights against the need for stability in collective-bargaining relationships.

A. Initial Contract

As the majority correctly notes, the Employer and the Union were negotiating for an initial contract. From December 1993 until November 15, 1996, the date on which it recognized the Union, the Employer had operated the MGM Grand Hotel without a collective-bargaining agreement and had developed its own employment practices. Contrary to my colleagues, I find that the fact that the Employer and the Union were negotiating for an initial contract did not pose unique difficulties. First, the relationship between the Employer and the Union was not strained by a bitter election contest. Indeed, the record discloses that the Board did not find the Employer guilty of any unfair labor practice charges since its opening, and despite the Union's organizational campaign. The Union and the Employer had operated for approximately 6 months under a voluntary neutrality agreement. Second, the Employer's employment procedures were forward looking and hardly repressive. Third, the Union and the Employer did not face the difficulties of negotiating new wage or benefits programs. The Union and Employer will keep the wage scale already in place (with any subsequent potential increases dependent on the Union's success at negotiating wages with other area employers, or ultimately, arbitration). Rather than negotiate new medical and retirement bene-

[26] *Lee Lumber & Building Material Corp.*, 322 NLRB 175, 179 (1996), remanded 117 F.3d 1454 (D.C. Cir. 1997).

[27] *Exxel-Atmos, Inc.*, 323 NLRB 888, 889 (1997), enfd. in relevant part 147 F.3d 973, 975 (D.C. Cir. 1998), cert. denied 525 U.S. 1067 (1999).

[28] *Lee Lumber & Building Material Corp.*, supra at 179.

[29] Id.

[30] *Ford Center for the Peforming Arts*, supra, slip op. at 1.

[31] Sec.7 of the Act states, in pertinent part: "[e]mployees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives *of their own choosing*." (Emphasis added.)

[32] Invoking "stability" begs the issue. We first must ask what is the desirability of the condition being stabilized and at what cost. Here the *minimum* cost is a 4-year delay in granting 1900 petitioning employees the Board-conducted secret-ballot election they have so persistently petitioned for.

fits, the Employer and the Union gave eligible employees the choice of either remaining in the Employer's previously established medical and retirement plans or joining the Union's medical and retirement plans. Finally, although certain existing employment procedures (such as leave procedures) were modified, only a problem-solving procedure had to be created from scratch.

My colleagues speculate that the elaborate framework within which the bargaining occurred necessitated an unusually lengthy bargaining period. This framework consisted of numerous subcommittees, committees, bargaining meetings, and task forces comprised of unit employee representatives. My colleagues emphasize that the Employer operates one of the world's largest hotel-casinos and that the unit contains 53 classifications. Concededly, these facts are relevant to the analysis of whether a reasonable time for bargaining had elapsed. But by November 6, 1997, the framework for bargaining was well established.[33] The subcommittees, committees, and task forces were all in place. There is nothing in the record that indicates that a process that might have been unwieldy in theory due to the unit's size and the Employer's size, was unwieldy in fact. By November 6, with a framework for and experience with bargaining well in place, the Employer and the Union had nonetheless failed to agree on several major issues.

B. Impasse

The second factor to examine is whether the bargaining parties reached impasse. They did not. However, the Board does not give the presence or absence of impasse controlling weight in determining whether a reasonable time for bargaining has elapsed.[34] In light of all the relevant facts surrounding the bargaining at issue, especially the bargaining parties' failure to reach agreement on several major issues at the time Petition III was filed, the absence of impasse here, standing alone, does not demonstrate that a reasonable time for bargaining had not elapsed when Petition III was filed.

C. Progress in Negotiations

At the time Petition III was filed, the Employer and the Union remained apart on several major issues. Why the bargaining parties were still apart is less important than their simple failure to execute an agreement nearly 1 year after the voluntary recognition. The parties' failure to agree on a contract after 356 days of bargaining demonstrates that although bargaining may have been fruitful in some areas, it was less successful in others. Progress—or even agreement—after November 6, 1997, is not controlling because, if the reasonable time standard is to have any meaning, a line must be drawn at some point. Here, over 1900 employees drew that line. Contrary to my colleagues, when we balance employees' rights against the policy favoring stability in bargaining relationships, we must give greater weight to employees' rights than the Employer and Union's expressed desire to continue bargaining in the face of a majority-supported decertification petition.

My colleagues argue that the bargaining parties were extremely close to executing an agreement when Petition III was filed. Again, as of November 6, 1997, the date on which the Petitioner filed Petition III, the parties remained apart on provisions relating to retirement benefits, medical benefits, a child care center, management rights and responsibilities (subcontracting provisions), no-strike/no-lockout, and workweek scheduling, as well as issues relating to tips for complimentary banquet or room service functions and tips and gratuities within the bell department. Of course, since the parties opposing the petitions entirely controlled the bargaining process and access to the negotiations, that is a claim easy to make and hard to disprove, especially by excluded employees who had no place at the table. Nevertheless, even on this self-serving record, I do not believe that the negotiating parties established that they were on the verge of signing a contract when Petition III was filed. Certain aspects of the Employer and Union's agreement and bargaining history strongly suggest that two issues, wages and the construction of a child care center, were put off for another day so that a collective-bargaining agreement could be executed in order to bar the decertification petition. A third issue, the "living contract" provision, is mistakenly treated by my colleagues as justification for the unusually lengthy bargaining period.

First, the agreement demonstrates that the Employer made no written commitment to construct a child care center. Novel as the four sentences that make up article 13 (child care center) may be in terms of getting a Las Vegas hotel-casino to at least consider building a child care center, they only commit the Employer to convene a committee to study to feasibility of establishing a child care center on the Employer's premises. There is no actual commitment to construct a child care center. Put differently, article 13 is only an agreement to negotiate at a later date.

Second, as noted, the wage agreement (art. 9) merely confirms that the wage increases already granted by the Employer to its employees as part of the customary wage increase were to last through July 14, 1998. Future wage increases would be negotiated subject to the Union's success at negotiating wage increases at other major hotel-casinos. Thus, section 9.03 contains a limited contract re-opener that permits the wage increases to be made part of the agreement. If the Employer and the Union fail to agree on wage rates, the matter would be

[33] As noted, small group meetings were added to the bargaining framework in the spring of 1997. Until then, the bargaining parties had relied on surveys, committees, subcommittees, task forces, and main negotiating sessions. Thus, the bargaining framework was completely in place by the spring of 1997. The Union did not present its first contract proposal to the Employer until April 8, 1997.

[34] *Lee Lumber & Building Material Corp.*, supra at 180 fn. 45.

submitted to an arbitrator, but wages could not exceed the Union's negotiated increases with other Las Vegas employers for comparable classifications.

Third, unlike the majority, which argues that the goal of the negotiations was to put into place a "living contract" that would serve as a pattern contract for other hotel-casinos, I find that the "living contract" provision, while perhaps unique among Las Vegas hotel-casinos, is, as articulated in the agreement, nothing more than a briefly described mechanism through which the Employer and Union, on mutual consent, may form problem-solving teams to handle problems not expressly contemplated by the agreement.[35] My colleagues incorrectly rely on the allegedly esoteric nature of the "living contract" concept as an excuse for the unusual duration of the bargaining process. I note, too, that section 2.01 (Partnership) of the agreement, which is not part of the "living contract" concept, states, in part, that "[b]oth parties agree to meet regularly, at the request of either party, to discuss problems, Cast Member [employee] suggestions, methods of improving morale, and other similar subjects." It is not entirely clear that issues that can be raised through the problem-solving teams cannot also be raised, through employee suggestions, through the section 2.01 provision. Put differently, it is not at all clear that the "living contract" provision is conceptually different from section 2.01 in any meaningful way. Prior to the ratification vote, the Employer and the Union did not specifically define for employees what the "living contract" concept is; thus, during the course of negotiations, the parties bargained over an esoteric issue that the employees outside of the housekeeping task force knew nothing about. Furthermore, the parties had agreed to the "living contract" provision by October 24, 1997, which means that negotiations relating to this provision were no longer an issue by the time the Petitioner filed Petition III. Whatever the theoretical merits of such an approach, in fact more than 1900 of the 3100 employees in the unit have clearly (and persistently) announced their belief that they are excluded and alienated from the process. The Employer and Union had not persuaded the supposed beneficiaries–the employees–of the benefits, and, sadly, the Board now slams an iron gate in the face of 1900 employees whose only request is that the Board allow them access to our crown jewel, a Board supervised secret-ballot election.

The record demonstrates that four negotiating sessions were held on or after November 6, 1997. In between that date and November 8, 1997, the Employer and the Union reached an agreement. The agreement was executed, after the ratification vote, on November 13, 1997. Although my colleagues find that the eligible employees overwhelmingly ratified the contract, that is a highly suspect conclusion. First, although there are approximately 3100 employees in the bargaining unit, only 843 employees voted, out of which 740 voted for the proposal. Second, it is possible that more employees did not vote because the ratification vote was inadequately publicized insofar as it occurred a mere 2 days after the Employer held informational meetings regarding the tentative agreement for the employees. Third, it is unclear whether employees had the opportunity to examine copies of the complete contract before the ratification vote. Finally, correspondence in the record addressed to counsel for the Union and the Employer demonstrates that Petitioner's counsel expressed concern about the inconvenient scheduling of the ratification vote and noted that many employees were reluctant, based on security concerns, to participate in a ratification vote at the Union's headquarters.

The Board has long favored its secret-ballot process as the most desirable means of ascertaining employees' preference regarding union representation. Thus, it is long established in Board law that, even with strict safeguards, an employer's "poll taken while a petition for a Board election is pending does not . . . serve any legitimate interest of the employer that would not be better served by the forthcoming Board election."[36] Why in these circumstances should a union's ratification vote be accorded deference when an employer poll in an analogous circumstance would not? Where more than twice as many unit employees have expressed dissatisfaction with the Union's performance than have expressed approval, common sense dictates that a formal election conducted by the Board should be held to determine employee sentiment. Unlike a situation where, for example, an employer has withdrawn recognition without an agreement, and a reasonable time analysis must be applied without knowing the results of the bargaining, a contract has been reached. The majority purports to draw support from the extensive efforts taken by the Employer and Union to "encourage broad employee participation in the bargaining process" and the large margin by which the contract was ratified. Without the record before us, this might seem persuasive. But not when only 740 *out of 3100* eligible employees voted and 1900 were simultaneously asking for a Board-conducted secret-ballot election. The remaining "justifications" regarding the innovative terms, studies, and the like should be addressed to the employees, not the Board. And we, sitting in our remote offices far removed from the hurley-burley of the hotel and casino, should be no more im-

[35] As discussed above, the concept of the "living contract" is embodied in sec. 2.02 of art. 2 (labor-management cooperation) which states, in part, "[t]he parties may establish Problem Solving Teams consisting of Cast Members (chosen by the Union), Union representatives, and management representatives (selected by the Cast Relations Department). . . . Teams may be utilized only be mutual agreement." Further, the Union and the Employer "may raise mutually agreed upon issues through the Teams," but the teams do not "supplant or replace" the usual dispute resolution procedure.

[36] *Struksnes Construction Co.,* 165 NLRB 1062, 1063 (1967).

pressed by these procedures than the 1900 employees who supported Petition III. The 3100 employees who must live and work under these "innovative" procedures should decide, not we.

What is relevant here is that, as of November 6, 1997, the Employer and the Union had not reached an agreement. Speculation about the difficulties inherent in an allegedly complicated bargaining situation is beside the point. In the time since the voluntary recognition, employees asked for an election to decide whether to retain the Union. Whether the bargaining was difficult or simple and whether the proposals were groundbreaking or mundane is less important than the fact that, on November 6, 1997, over 60 percent of the employees demonstrated their displeasure with their bargaining representative which was, after all, recognized only by a thin majority.

Petition III was the vehicle through which employees dissatisfied with the negotiations sought to shed light on the negotiations between the Employer and the Union. Inexplicably, my colleagues elevate the bargaining relationship between the Employer and the Union over employees' Section 7 rights, which is the only basis for validating that relationship. In doing so, they emasculate Section 7 and extend the voluntary recognition bar to a point never before seen in Board law.[37] What now remains of the distinction between the certification year rule and the reasonable time for bargaining standard?

My colleagues also break new ground by giving unions an incentive to reach an attractive agreement with an employer at employees' expense. But the Board must never forget that unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions. To allow a union to reach an agreement with an employer while ignoring the desires of over 1900 employees the Union purportedly represents strikes at the core of the Act, which is designed, after all, to protect employees' right to organize or refrain therefrom.

Today, the Employer and the Union get the agreement they wanted. Over 1900 employees asked for an election. Unfortunately, they will not get what they wanted even though a reasonable time for bargaining had elapsed when Petition III was filed. I dissent.

---

[37] My research reveals no case finding that a reasonable period of time for bargaining following an employer's lawful voluntary recognition of a union had not elapsed beyond 9 months. *Ford Center for the Performing Arts*, supra, slip op. at 1.